

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 13

Expert Testimony

13.1 The Michigan Test for Admissibility of Expert Testimony

Beginning with the third paragraph on page 283, replace the text of Section 13.1 with the following:

Michigan Rules of Evidence 702–707 govern the use of expert testimony at trial. MRE 702* provides the standard for admissibility of expert testimony:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

The amendments made to MRE 702 eliminated the rule’s former requirement that expert testimony be derived from a “recognized” discipline. The amended rule’s omission of the word “recognized” impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines “recognized” as credible sources at the time of the decision.

The staff comment to amended MRE 702 states:

“The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words ‘the court determines that’

*The amended text of MRE 702 is effective January 1, 2004.

after the word ‘If’ at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court’s gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.”

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Expert Testimony

13.4 Evaluating the Reliability of Expert Testimony

Change the title to Section 13.4 as indicated above, and replace the text of the Section with the following:

After January 1, 2004, MRE 702, as amended, succeeds Michigan's *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. Effective January 1, 2004, MRE 702 eliminated its former requirement that expert testimony be based on knowledge "recognized" by the appropriate scientific community. MRE 702, as amended, provides:

"If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

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Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert*, *supra* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs

the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert*.

To the extent that they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.